Essay

The Future of Deference

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Abstract

In this Essay, Professor Richard Pierce describes the history of the deference doctrines the Supreme Court has announced and applied to agency interpretations of ambiguous statutes and rules over the last seventy years. He predicts that the Court will continue to reduce the scope and strength of those doctrines, in part because of increasing concern about the temporal inconsistencies created by those doctrines. In the current highly polarized political environment, deference doctrines create a legal framework in which the "law" applicable to many agency actions changes every time a President of one party replaces a President of the other party.

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Introduction

For over seventy years, the Supreme Court has applied a variety of deference doctrines when reviewing actions taken by agencies. This Essay will focus primarily on the origins, bases, effects, and likely future of three of those doctrines—the *Skidmore* doctrine, first announced and applied in 1944;[1] the *Chevron* doctrine, first announced and applied in 1984;[2] and, the *Seminole Rock* doctrine, first announced and applied in 1945,[3] and reaffirmed and renamed the *Auer* doctrine in 1997.[4]

Part I describes each of the doctrines, along with the purposes and effects of each. Part II describes the ways in which the Court has applied each of the doctrines over time, with particular emphasis on opinions it has issued over the last four years. Part II concludes that the Court is in the process of eliminating or weakening significantly two of the doctrines. That is at least in part a result of the Court's distaste for one of the effects of those doctrines—changes in law over time due to the differing political perspectives of various presidential administrations. Part III discusses the potential good and bad effects of the doctrinal changes predicted in Part II. The Essay concludes by agreeing with Peter Strauss's opinion that the beneficial effects of the changes may be greater than the adverse effects when the Supreme Court itself reviews agency actions, but that the adverse effects of the changes exceed the beneficial effects when lower courts review agency actions.[5] This discussion ends with a question: can and should the Supreme Court instruct lower courts to act in a manner inconsistent with the Supreme Court's actions?

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1 Skidmore v. Swift & Co., 323 U.S. 134 (1944).

2 Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

3 Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945).

4 Auer v. Robbins, 519 U.S. 452 (1997).

5 *Cf.* Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 Colum. L. Rev. 1093, 1094–96, 1117–18, 1134–36 (1987). Strauss has expressed this particular opinion only in emails so far, but it follows logically from the points he makes in this article. *Cf. id.*; *see infra* text accompanying notes 17–19.

I. The Doctrines, Their Purposes, and Their Effects

A. Skidmore

In its 1944 opinion in *Skidmore v. Swift & Co.*,[6] the Court announced that: "The weight [accorded to an agency judgment] in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[7] The test was based on the comparative advantage of specialized agencies over generalist courts because of agencies' greater subject matter expertise and greater experience in implementing a statutory regime.[8] The results when this standard was applied suggest that it is deferential to agency decisions. Depending on the time period studied, researchers have found that courts have upheld agency actions in 55.1% to 70.9% of cases under *Skidmore*.[9] The *Skidmore* test has also produced inconsistent and unpredictable results, however.[10]

B. Chevron

In its 1984 opinion in *Chevron v. Natural Resources Defense Council*,[11] the Court announced a new test that most people believed to be a replacement for the *Skidmore* test:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter . . . . If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[12]

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6 Skidmore v. Swift & Co., 323 U.S. 134 (1944).

7 *Id.* at 140.

8 *Id.* at 139–40.

9 Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 Admin. L. Rev. 77, 83–84 (2011).

10 *See* Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 Colum. L. Rev. 1235, 1281 (2007).

11 Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

12 *Chevron*, 467 U.S. at 842–43.

In other parts of the opinion, the Court replaced "permissible" with "reasonable."[13] The second step of the *Chevron* test above is a restatement of the test to determine whether an agency action is "reasonable" or arbitrary and capricious, which the Court announced in its 1983 opinion in *Motor Vehicle Manufacturers' Association of the United States v. State Farm Mutual Automobile Insurance Co.*:[14]

> Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[15]

The Court based the *Chevron* test on constitutional and political grounds rather than on the basis of comparative expertise.[16] The Court distinguished between issues of law that a Court can resolve by determining the intent of Congress and issues of policy that should be resolved by the politically accountable executive branch rather than the politically unaccountable judicial branch, when Congress has declined to resolve the issue.[17]

The *Chevron* test has another beneficial effect in addition to the enhanced political accountability for policy decisions that it yields. By giving agencies the discretion to choose among several "reasonable" interpretations of an ambiguous statute, the *Chevron* test reduced geographic differences in the interpretation of national statutes by reducing the number of splits among the circuits produced by circuit court applications of the less deferential *Skidmore* test.[18] At least for a time, *Chevron* had that effect because it was applied consistently by circuit courts. A study of applications of *Chevron* by circuit courts the year after the court decided *Chevron* found that the rate at which courts upheld agency interpretations of statutes was 81%—a rate between 10% and 30% greater than the rate at which courts upheld agency actions under the *Skidmore* test.[19] Because there is only one agency and many circuit courts, that increased rate of upholding

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13 *See id.* at 844.

14 Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

15 *Id.* at 43.

16 *See Chevron*, 467 U.S. at 865–66.

17 *See id.*

18 Strauss, *supra* note 5, at 1120–22.

19 Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1031–32.

agency statutory interpretations necessarily produced increased geographic uniformity in interpretation of national statutes.

Chevron also had another effect that is more controversial. It created a legal regime in which a new administration could change the interpretation of an ambiguous provision of a statute as long as it engaged in the process of reasoned decisionmaking required by *State Farm*. Indeed, that is what the agency did, and the Court unanimously upheld, in *Chevron*.[20] The Court explicitly confirmed this effect in its 2005 opinion in *National Cable & Telecommunications Association v. Brand X Internet Services*.[21] The Court held that a judicial decision that upholds an agency interpretation does not preclude an agency from changing its interpretation if it provides adequate reasons for doing so.[22] *Brand X* made it clear that the only kind of judicial opinion involving the interpretation of an agency-administered statute that precludes an agency from adopting a different interpretation is one in which the court concludes that there is one and only one permissible interpretation of the statute.[23] Thus, *Chevron* increased temporal inconsistency in interpretation of national statutes at the same time that it decreased geographic inconsistency in interpretation of national statutes.

C. Auer

The Court first announced what is now called the *Auer* doctrine in its 1945 opinion in *Bowles v. Seminole Rock & Sand Co*.[24] The Court inexplicably changed the name of the doctrine to the *Auer* doctrine following its 1997 opinion in *Auer v. Robbins*.[25] The *Auer* doctrine is similar in its effects to the *Chevron* doctrine, but it applies not to agency interpretations of agency-administered statutes but to

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20 *Chevron*, 467 U.S. at 838 ("[W]hen a new administration took office in 1981, the EPA, in promulgating the regulations involved here, reevaluated the various arguments that had been advanced in connection with the proper definition of the term 'source' and concluded that the term should be given the plantwide definition in nonattainment areas.").

21 Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981–82 (2005) ("That is no doubt why in *Chevron* itself, this Court deferred to an agency interpretation that was a recent reversal of agency policy."); *see also* Richard J. Pierce, Jr., *Reconciling* Chevron *and Stare Decisis*, 85 GEO. L.J. 2225, 2242 (1997) (arguing that under *Chevron*, "an institution should overrule a mistaken precedent if it can provide a good reason for that action").

22 *See Brand X*, 545 U.S. at 981.

23 *Id.* at 982.

24 Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 413–14 (1945).

25 Auer v. Robbins, 519 U.S. 452, 461 (1997); Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2166–67 (2012) (referring to it as *Auer* deference).

agency interpretations of its own agency rules.[26] In the process of reviewing agency interpretations of agency rules, the Court instructed courts to give the agency interpretation controlling weight unless it is "plainly erroneous or inconsistent with the regulation."[27]

The Court did not give reasons for the *Auer* test when it announced the test, but many scholars have drawn the inference that the test was based primarily on comparative institutional expertise with respect to the field in which the rule was issued and the relationship of the rule to the statute the agency was implementing.[28] The test has had effects similar to the effects of the *Chevron* test.[29]

The rate at which courts have upheld an agency rule under the *Auer* doctrine is at least as high as the rate at which courts have upheld agency interpretations of agency-administered statutes. A study of Supreme Court applications of *Auer* between 1984 and 2006 found that the Supreme Court upheld 90.9% of the interpretations it reviewed.[30] The sample size was small, however, so it is risky to attach much significance to that extraordinarily high rate of upholding. The Court reviewed only eleven agency interpretations of rules during that period.[31] An empirical study of 219 applications of *Auer* by district courts and circuit courts during the periods 1999–2001 and 2005–2007 provides a more reliable indication of the effect of *Auer*.[32] That study found that lower courts upheld 76.26% of agency interpretations of agency rules—a rate slightly higher than the rate at which courts upheld agency interpretations of statutes when they applied *Chevron*.[33]

Auer also had the same effects as *Chevron* in the context of agency interpretations of agency rules. It reduced geographic differences in the interpretation of rules that are supposed to have a uni-

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26 *Auer*, 519 U.S. at 461 (evaluating a salary-basis test created by the Secretary of Labor's own regulations).

27 *Id.* (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989)).

28 *E.g.*, Richard J. Pierce, Jr. & Joshua Weiss, *An Empirical Study of Judicial Review of Agency Interpretations of Agency Rules*, 63 ADMIN. L. REV. 515, 517 (2011) (describing "the familiar expertise-based comparative institutional advantage that has long been the primary justification for most doctrines that instruct courts to defer to agencies").

29 *See, e.g.*, *id.* at 520 (finding that courts apply *Auer* deference "in about the same manner as . . . the other deference doctrines").

30 *See* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1103–04, 1142 (2008) (listing the *Auer* doctrine under its former name, *Seminole Rock*); *see also supra* text accompanying note 25.

31 Eskridge & Baer, *supra* note 30, at 1103–04.

32 Pierce & Weiss, *supra* note 28, at 519.

33 *Id.*

form national meaning, but it increased temporal differences in the interpretation of rules.[34]

II. Questions Raised by Judicial Applications of Deference Doctrines

A. Chevron *and* Skidmore *Deference*

This Section will discuss judicial applications of both *Chevron* and *Skidmore* because the two doctrines became intertwined in 2000.[35] Circuit courts immediately began to apply *Chevron* in 1984, with a resulting significant increase in the percentage of agency statutory interpretations that they upheld and a decrease in geographic differences in the meaning given to national statutes, which are meant to have the same meaning throughout the country.[36]

In contrast to the treatment of the *Chevron* doctrine by circuit courts, the Supreme Court has never consistently applied the *Chevron* doctrine. The first indication that the Court did not fully embrace the *Chevron* doctrine came just three years after the Court decided *Chevron*, ironically in an opinion written by Justice Stevens, the author of the original *Chevron* opinion. In *INS v. Cardoza-Fonseca*,[37] Justice Stevens authored a majority opinion that seemed to elevate an ambiguous footnote in the *Chevron* opinion to a holding while demoting the test the Court announced in *Chevron* to the status of a footnote.[38] The question before the Court was whether to uphold an agency interpretation of a statute to which *Chevron* deference obviously applied,[39] but Justice Steven approached the question as if the agency interpretation did not exist.[40] As Justice Stevens put it: "The question . . . is a pure question of statutory construction for the courts to decide. . . . [e]mploying traditional tools of statutory construction . . . ."[41] He had used similar words in a footnote to the test he announced on behalf of a unanimous Court in *Chevron*.[42] Justice Scalia wrote a concurring

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34 *See, e.g.*, Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199 (2015) (upholding agency interpretation of rule that was inconsistent with agency's prior interpretation).

35 *See infra* text accompanying notes 48–50.

36 *Supra* text accompanying notes 18–19.

37 INS v. Cardoza-Fonseca, 480 U.S. 421 (1987).

38 *See id.* at 448.

39 *Id.* at 423–34

40 *See id.* at 445–46

41 *Id.* at 446.

42 Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984).

opinion in *Cardoza-Fonseca* in which he characterized the majority's approach as "an evisceration of *Chevron*."[43]

The Court has been inconsistent in its treatment of *Chevron* in every Term since 1987.[44] Sometimes it applies a strong version of *Chevron*;[45] more often the Justices disagree about both the applicability and the effect of *Chevron*;[46] and, in many cases the Court simply ignores *Chevron* completely in a situation in which it obviously applies.[47]

In the period from 2000 to 2002, the Court issued opinions that added a great deal of confusion to the interpretation, applicability, and scope of its deference doctrines. In *Christensen v. Harris County*,[48] a majority of Justices held that *Chevron* applies only to some agency statutory interpretations and that *Skidmore* applies to others.[49] Justice Scalia wrote a concurring opinion in which he criticized the majority for resurrecting the "anachronis[tic]" *Skidmore*

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43 *Cardoza-Fonseca*, 480 U.S. at 454 (Scalia, J., concurring in the judgment).

44 For discussion of the Court's erratic treatment of *Chevron* in scores of cases, see KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 3.5, 3.6 (5th ed. Supp. 2015); 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 3.5, 3.6 (5th ed. 2010).

45 *See e.g.*, City of Arlington v. FCC, 133 S. Ct. 1863, 1874–75 (2013) (asserting that the Court must defer to an agency's interpretation of an ambiguous statute); Mayo Found. for Med. Educ. & Research v. United States, 562 U.S. 44, 55–58 (2011) (asserting that when Congress has not specifically addressed the question at issue, *Chevron* requires the Court to defer to the agency's interpretation).

46 *Compare* Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2449 (2014) (holding that the EPA exceeded its statutory authority in interpreting the Clean Air Act, so no *Chevron* deference is granted), *with id.* at 2455 (Breyer, J., concurring in part and dissenting in part) (arguing that the EPA was authorized to interpret the Clean Air Act). *Compare* Scialabba v. Cuellar de Osorio, 134 S. Ct. 2191, 2213 (2014) (arguing that conflicting clauses in a statute constitute ambiguity such that *Chevron* deference to an agency's interpretation is warranted), *with id.* at 2214 (Roberts, C.J., concurring in the judgment) (arguing that conflicting clauses in a statute do not constitute ambiguity and that *Chevron* does not authorize agencies to "repair" directly conflicting statutes). *Compare* United States v. Home Concrete & Supply, LLC, 132 S. Ct. 1836, 1843–44 (2012) (arguing that an agency may exercise its "gap-filling" powers with respect to an ambiguous text when it is evident that Congress intended the particular ambiguity in question to be resolved by the agency), *with id.* at 1847 (Scalia, J., concurring in part and concurring in the judgment) (arguing that the relevant *Chevron* analysis is not whether Congress intended to authorize an agency to fill a statutory gap, but simply whether a statutory gap exists for the agency to fill).

47 *See, e.g.*, Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507 (2015) (agency's interpretation of the Fair Housing Act); United States v. Apel, 134 S. Ct. 1144, 1151–53 (2014) (interpreting the meaning of "installation" as used in a trespass statute); Carachuri-Rosendo v. Holder, 560 U.S. 563, 581 (2010) (interpreting criminal statutes in immigration laws).

48 Christensen v. Harris Cty., 529 U.S. 576 (2000).

49 *Id.* at 586–87.

doctrine that he believed the Court had replaced with the *Chevron* doctrine in 1984.[50] The Justices who disagreed with applying *Skidmore* divided three ways in expressing widely differing opinions about the appropriate scope and effect of deference doctrines.[51]

A year later, in *United States v. Mead Corp*.,[52] a majority again held that *Skidmore* rather than *Chevron* applies to some agency statutory interpretations.[53] The majority noted that "the overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication," but it acknowledged that "we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded . . . ."[54]

Justice Scalia disagreed again.[55] He criticized the majority for making "an avulsive change in judicial review of federal administrative action,"[56] by replacing *Chevron* "with that test most beloved by a court unwilling to be held to rules . . .: th'ol' 'totality of the circumstances' test."[57] He characterized the *Skidmore* test as "an empty truism and a trifling statement of the obvious," and criticized the majority for announcing criteria to determine whether *Chevron* or *Skidmore* apply as resulting in "confusion" and "utter[ly] flabb[y]."[58]

A year after the Court issued its opinion in *Mead,* a majority seemed to merge and to blend the *Chevron* and *Skidmore* doctrines in *Barnhart v. Walton*.[59] The majority concluded that an agency's "longstanding" statutory interpretation was entitled to *Chevron* deference even though it was not announced in a rulemaking or in a formal adjudication because of "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time . . . ."[60]

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50 *Id.* at 589 (Scalia, J., concurring in part and concurring in the judgment).

51 *See id.* at 588–91 (Scalia, J., concurring in part and concurring in the judgment); *id.* at 592–96 (Stevens, J., dissenting); *id.* at 596–97 (Breyer, J., dissenting).

52 United States v. Mead Corp., 533 U.S. 218 (2001).

53 *Id.* at 221.

54 *Id.* at 230–31.

55 *Id.* at 239–61 (Scalia, J., dissenting).

56 *Id.* at 239 (Scalia, J., dissenting).

57 *Id.* at 241 (Scalia, J., dissenting).

58 *Id.* at 245, 250 (Scalia, J., dissenting).

59 Barnhart v. Walton, 535 U.S. 212 (2002).

60 *Id.* at 219, 222.

In a concurring opinion, Justice Scalia agreed that the interpretation at issue was due *Chevron* deference, but he criticized the majority's reference to "anachronis[tic]" factors like whether the agency interpretation is "longstanding," as "a relic of the pre-*Chevron* days, when there was thought to be only one 'correct' interpretation of a statutory text."[61] He noted that the interpretation the Court upheld in the *Chevron* case itself was a recent change from a prior interpretation.[62]

In the meantime, the circuit courts were doing their best to comply with the Supreme Court's constantly changing approach to deference. At first, they applied *Chevron* consistently, with a resulting large increase in the proportion of agency statutory interpretations they upheld.[63] As they began to observe the inconsistency in the Supreme Court's approach to *Chevron*, however, they followed the Court's lead and became less consistent in their applications of *Chevron*, with a resulting reduction in the proportion of agency statutory interpretations they upheld.[64]

After the Supreme Court issued its trilogy of opinions in *Christensen*, *Mead*, and *Barnhart*, any semblance of clarity and consistency in circuit courts' approach to judicial review of agency statutory interpretations declined significantly.[65] Circuit courts began to write opinions that blended *Chevron* and *Skidmore* in a variety of ways.[66] They also began to write opinions in which they hedged their bets by making statements to the effect of "even if we were to apply the stronger version of deference announced in *Chevron* we would reject the agency's interpretation" or "even if we were to apply the weaker version of deference announced in *Skidmore*, we would uphold the agency interpretation."[67]

The opinions issued by the Supreme Court in two major cases decided during the 2015 Term provide evidence of where the Court is going and why. In *King v. Burwell*,[68] a six-Justice majority refused to apply *Chevron* in the process of adopting as its own an interpretation

61 *Id.* at 226 (Scalia, J., concurring in part and concurring in judgment).

62 *See id.*

63 Schuck & Elliott, *supra* note 19, at 1057 (81% in 1985).

64 *See* Pierce, *supra* note 9, at 84 (between 65.2% and 73% from 1991 to 2006).

65 *See* Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1475 (2005).

66 *See id.* at 1446.

67 *See, e.g.*, Price v. Stevedoring Servs. of Am., Inc, 697 F.3d 820, 833 (9th Cir. 2012); Shipbuilders Council of Am. v. U.S. Coast Guard, 578 F.3d 234, 243 (4th Cir. 2009).

68 King v. Burwell, 135 S. Ct. 2480 (2015).

of a provision of the Affordable Care Act ("ACA").[69] This interpretation was, in fact, the same as the interpretation announced by the Internal Revenue Service ("IRS"), the agency that is responsible for implementing that provision.[70] The IRS had interpreted the tax credit provision of the ACA to allow citizens of all states to be eligible for the credit, rather than the interpretation urged by the petitioners, which would have rendered citizens of thirty-four states ineligible for these credits.[71] The majority concluded that the tax provision was ambiguous but that *Chevron* did not apply[72] because:

> The tax credits are among the Act's key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people. Whether these credits are available on Federal Exchanges is thus a question of deep "economic and political significance" that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly. It is especially unlikely that Congress would have delegated this decision to the *IRS*, which has no expertise in crafting health insurance policy of this sort. This is not a case for the IRS.[73]

The dissenting Justices disagreed with the majority's interpretation of the statute, but they did not disagree with the majority's conclusion that *Chevron* did not apply or that the Court, not the agency, should instead resolve the question of the proper interpretation of the ACA without conferring any deference to the agency's interpretation.[74]

In *Michigan v. EPA*,[75] the question was whether to uphold the EPA's interpretation of the statutory standard "appropriate and necessary" to allow it to take a regulatory action without considering cost.[76] The majority applied an unusual version of *Chevron*. It skipped step one entirely and applied a strong version of step two.[77] It held that the agency's interpretation of the standard to allow it to make a decision without considering cost was unreasonable because:

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69 *See id.* at 2488–89.

70 *See id.* at 2482, 2495–96.

71 *Id.* at 2487–88.

72 *Id.* at 2488–89.

73 *Id.* at 2489 (citations omitted).

74 *Id.* at 2496–97 (Scalia, J., dissenting).

75 Michigan v. EPA, 135 S. Ct. 2699 (2015).

76 *Id.* at 2704–05 (quoting 42 U.S.C. § 7412(n)(1)(A) (2012)).

77 *See id.* at 2706–07.

> [a]gencies have long treated cost as a centrally relevant factor when deciding whether to regulate. Consideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions. It also reflects the reality that "too much wasteful expenditure devoted to one problem may well mean considerably fewer resources available to deal effectively with other (perhaps more serious) problems." Against the backdrop of this established administrative practice, it is unreasonable to read an instruction to an administrative agency to determine whether "regulation is appropriate and necessary" as an invitation to ignore cost.[78]

The dissenting Justice did not discuss the *Chevron* test that the Court applied, but they agreed with the majority's conclusion that if the EPA's interpretation of the statute was to allow it to make regulatory decisions without considering cost, that would be unreasonable: "I agree with the majority—let there be no doubt about this—that EPA's power plant regulation would be unreasonable if '[t]he Agency gave cost no thought *at all*.' But that is just not what happened here."[79]

The dissenting Justices went on to explain why they believed that the EPA had in fact considered cost at an appropriate stage in the decisionmaking process.[80] Thus, all nine Justices applied step two of *Chevron* in a way that eliminated any discretion for the agency to adopt an interpretation of the statute that differed from the only interpretation the Court found to be reasonable.

After the Court qualified *Chevron* in ways that made it difficult to distinguish it from *Skidmore* in *Christensen*, *Mead*, and *Barnhart*, it is hard to tell whether or to what extent *Chevron* exists as an independent deference doctrine.[81] In any event, after *King* and *Michigan*, the Court now has five ways of conferring neither *Chevron* deference nor *Skidmore* deference on agency actions. It can simply ignore both doctrines and resolve an issue of statutory interpretation without conferring any deference on the agency interpretation;[82] it can use all of the "tools of statutory construction" to resolve an issue of statutory inter-

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78 *Id.* at 2707–08 (citation omitted) (quoting Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 233 (2009) (Breyer, J., concurring in part and dissenting in part)).

79 *Id.* at 2714 (Kagan, J., dissenting) (citation omitted) (quoting *id.* at 2706).

80 *Id.* at 2714–15 (Kagan, J., dissenting).

81 *See supra* text accompanying notes 48–67.

82 *See supra* note 47.

pretation at the time it applies step one of *Chevron*;[83] it can decline to apply any deference doctrine because the interpretative issue is important;[84] it can decline to apply any deference doctrine to an agency interpretation because the agency lacks sufficient expertise in the field that is affected by the rule to justify deference;[85] or it can apply a version of step two of *Chevron* that is functionally indistinguishable from an independent judicial resolution of the statutory interpretation issue.[86] The Court has used each of these methods of avoiding deferring to agency statutory interpretations, and it will have many more opportunities to use each in the future.[87]

B. Auer *Deference*

As it was initially stated, the *Auer* doctrine seemed to be unusually deferential to agency interpretations of rules: the agency interpretation is of controlling weight unless it is "plainly erroneous or inconsistent with the regulation."[88] As applied, the doctrine never had as powerful an effect as the initial characterization of the test implied

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83 *See, e.g.*, INS v. Cardoza-Fonseca, 480 U.S. 421, 447–48 (1987). *See generally* Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749 (1995).

84 *See* King v. Burwell, 135 S. Ct. 2480, 2483 (2015).

85 *See id.*

86 *See* Michigan v. EPA, 135 S. Ct. 2699, 2709–10 (2015).

87 The importance of the interpretative issue criterion is highly elastic. The Court could easily have applied it to the question of whether Congress intended to require the EPA to regulate automobile carbon dioxide emission that the Court addressed in *Massachusetts v. EPA*, 549 U.S. 497 (2007), or even to the EPA decision to adopt the "bubble" concept in *Chevron* itself. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984). Both required some institution to resolve a major interpretative issue in a context in which many billions of dollars were at stake. The inadequate expertise method is likely to arise with great frequency in the future. Over half of the rules that the IRS issues are arguably outside its area of expertise. Kristin E. Hickman, *Administering the Tax System We Have*, 63 DUKE L.J. 1717, 1747–53 (2014). The number of IRS interpretations of statutes that are unrelated to collecting taxes that are reviewed by courts will increase as a result of the four holdings in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012). In that case, the Court held that a key provision of the ACA was not within the scope of Congress's power under the Commerce Clause, *Sebelius*, 132 S. Ct. at 2593, and it imposed an unprecedented limit on Congress's power under the Spending Clause. *See Sebelius*, 132 S. Ct. at 2603–04. It also held that the provision was within Congress's power to tax. *Id.* at 2598. That combination of holdings will encourage Congress to use the power to tax, implemented by the IRS, as the basis for other regulatory statutes. The *Sebelius* Court also adopted unusually narrow interpretation of the Anti-Injunction Act. *Id.* at 2582–84. Those interpretations inevitably will require courts to engage in pre-enforcement review of virtually all of the many rules that the IRS issues that are arguably outside its expertise as a tax collecting agency.

88 Auer v. Robbins, 519 U.S. 452, 461 (1997) (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989)).

by the Court.[89] In recent years, the Court has qualified the doctrine in many ways.[90] Many of the qualifications were based on an article in which John Manning made a strong argument that *Auer* deference was not sensible even if *Chevron* deference was.[91] Manning argued that *Auer* deference gave agencies an unhealthy incentive to issue rules that are vague and ambiguous.[92]

As modified over the last decade, the *Auer* doctrine does not apply when an agency adopts a new interpretation of an ambiguous rule in the process of imposing a penalty in an enforcement proceeding.[93] It does not apply when an agency relies on a new interpretation of an ambiguous rule as the basis to require a regulated firm to make large payments to third parties.[94] It does not apply when an agency has not interpreted the rule to apply in a situation for a long period of time.[95] It does not apply when the interpretation "lacks the hallmarks of thorough consideration."[96] It does not apply if it is arbitrary and capricious.[97] It does not apply when the rule the agency is interpreting is as broad as the statute the agency is implementing.[98] More recently, some Justices have urged the Court to overrule *Auer*,[99] and others have suggested that they would seriously consider overruling *Auer* in an appropriate case and have invited parties to bring the Court an appropriate case.[100]

C. Counting the Justices

It is easy to identify Justices who want to overrule the deference doctrines or to qualify and interpret them out of existence. It is hard

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89 *See* Pierce & Weiss, *supra* note 28, at 519.

90 For detailed discussion of the cases, see HICKMAN & PIERCE, *supra* note 44, § 6.11; PIERCE, *supra* note 44, § 6.11.

91 John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 654 (1996).

92 *Id.* at 655.

93 *See, e.g.*, Gates & Fox Co. v. Occupational Safety & Health Review Comm'n, 790 F.2d 154, 156 (D.C. Cir. 1986), *cited favorably in* Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2167 (2012).

94 *See Christopher*, 132 S. Ct. at 2167.

95 *See id.* at 2168.

96 *Id.* at 2169.

97 *See id.*

98 *See* Gonzales v. Oregon, 546 U.S. 243, 256–57 (2006).

99 *See* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1213 (2015) (Scalia, J., concurring); *id.* at 1225 (Thomas, J., concurring).

100 *See* Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1338 (2013) (Roberts, C.J., concurring). Justice Alito joined Chief Justice Roberts's concurrence. *See id.*

to identify any Justice who is in favor of maintaining a strong version of the deference doctrines.

Two Justices have urged the Court to overrule *Auer*.[101] Two others have invited a petitioner to bring the Court a case that would provide an appropriate vehicle to allow it to overrule *Auer*.[102] All of the Justices have shown their lack of support for a strong version of *Auer* by qualifying the doctrine in significant ways.[103]

Two Justices have expressed their opposition to *Chevron*.[104] Only Justice Scalia had repeatedly said that he supported *Chevron*,[105] and there were reasons to doubt that he continued to support *Chevron*. Justice Scalia's approach to *Chevron* had always been puzzling. *Chevron* is the most deferential of the doctrines that the Court applies to agency statutory interpretations, but Justice Scalia deferred less frequently to agency actions than any other Justice.[106] He rarely found ambiguity in a statute, so he often avoided conferring any deference on an agency's statutory interpretation by concluding that Congress resolved the interpretative issue before the Court.[107]

Justice Scalia also dissented from the decision in *Brand X* that explicitly authorized agencies to change statutory interpretations that a court has upheld as reasonable even though *Brand X* seems to be just a restatement of *Chevron*.[108] In fact, *Chevron* itself involved the same sequence of agency and judicial interpretations that the Court held to be permissible in *Brand X*.[109]

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101 *See Perez*, 135 S. Ct. at 1213 (Scalia, J., concurring); *id.* at 1214–15 (Thomas, J., concurring).

102 *See Decker*, 133 S. Ct. at 1339 (Roberts, C.J., concurring). Justice Alito joined Chief Justice Roberts's concurrence. *See id.*

103 *See supra* text accompanying notes 89–100.

104 Justice Thomas has repeatedly expressed the view that *Chevron* is unconstitutional. *See, e.g.*, Michigan v. EPA, 135 S. Ct. 2699, 2712 (Thomas, J., concurring). Justice Breyer was highly critical of *Chevron* even before he joined the Court, *see* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 372–82 (1986), and his pattern of opinions since he joined the Court has been consistent with that view, *see, e.g.*, Barnhart v. Walton, 535 U.S. 212, 222 (qualifying *Chevron* by adding the factors the Court has used in applying the *Skidmore* test).

105 *See e.g.*, INS v. Cardoza-Fonseca, 480 U.S. 421, 453–55 (1987) (Scalia, J., concurring in the judgment). *See generally* The Honorable Antonin Scalia, *Judicial Deference to Administrative Interpretation of Law*, 1989 DUKE L.J. 511, 513–17.

106 Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823, 826 (2006).

107 *See* Pierce, *supra* note 83, at 777–78; Scalia, *supra* note 105, at 521.

108 Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 969, 1005–20 (2005) (Scalia, J., dissenting).

109 *See id.* at 967–72; Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 837 (1984).

In one opinion he wrote for a majority of Justices during the 2015 Term, Justice Scalia ignored the first step of the *Chevron* test and then applied an extraordinarily strong version of step two that had the effect of precluding the agency from adopting an interpretation of the statute that differed from the Court's interpretation.[110] In dicta in another opinion he wrote during the 2015 Term, Justice Scalia engaged in a harsh critique of *all* deference doctrines:

> "The [APA] was framed against a background of rapid expansion of the administrative process as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices." . . . The Act thus contemplates that courts, not agencies, will authoritatively resolve ambiguities in statutes and regulations. . . .
>
> Heedless of the original design of the APA, we have developed an elaborate law of deference to agencies' interpretations of statutes and regulations. Never mentioning § 706's directive that the "reviewing court . . . interpret . . . statutory provisions," we have held that *agencies* may authoritatively resolve ambiguities in statutes. *Chevron U.S.A. Inc. v. Natural Resources Defense Council* . . . . And never mentioning § 706's directive that the "reviewing court . . . determine the meaning or applicability of the terms of an agency action," we have—relying on a case decided before the APA, *Bowles v. Seminole Rock & Sand Co.* . . .—held that *agencies* may authoritatively resolve ambiguities in regulations. *Auer v. Robbins* . . . .[111]

None of the other Justices have expressed an opinion for or against *Chevron*, but all have joined in opinions that ignore *Chevron*, opinions that conclude that it does not apply for some reason, and opinions that have qualified it in important respects.[112]

D. Inferring the Motives of the Justices

The opinions described in Sections II.B and II.C provide persuasive evidence that the Court is in the process of making major changes in its deference doctrines. Those opinions are likely to foreshadow

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110 *See* Michigan v. EPA, 135 S. Ct. 2699, 2706–07 (2015); *see also supra* notes 75–80 and accompanying text.

111 Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1211 (2015) (citations omitted) (quoting United States v. Morton Salt Co., 338 U.S. 632, 644 (1950)); 5 U.S.C. § 706 (2012).

112 *See, e.g.*, *supra* notes 46–79 and accompanying text.

opinions that overrule the doctrines, apply them less frequently, and/or weaken them further.

This Section will attempt the risky task of inferring the motives of the Justices. The starting point in any such effort must be to recognize that it is unlikely that any Justice has only one reason for doubting the wisdom of the original strong versions of the deference doctrines. Thus, for instance, Justice Thomas undoubtedly is motivated in part by his belief that the *Chevron* doctrine is unconstitutional;[113] Justice Breyer is motivated in part by his belief that the *Chevron* test is too simplistic;[114] and the Justices who have urged the Court to overrule the *Auer* doctrine are motivated in part by their concern that it encourages agencies to issue rules that are vague and ambiguous.[115]

The Court's recent pattern of opinions provides circumstantial evidence of one source of concern about the effects of the deference doctrines that seems to be shared by all of the Justices—temporal differences in interpretations of statutes and rules based on changes in the political party that controls the executive branch. This concern would explain Justice Scalia's dissent in *Brand X*[116] and many of the Court's other recent opinions.

The interpretive issue in *King* was whether the ACA makes the citizens of all fifty states eligible for large tax credits when they buy health insurance or whether only the citizens of twelve states would be eligible for the credits.[117] The statutory provision seemed to support the latter position, and three dissenting Justices expressed that view.[118] The majority used the structure and purpose of the statute to support its conclusion that the statute was ambiguous.[119] Ordinarily, the majority would then have applied *Chevron* and upheld the agency interpretation as reasonable.[120] The majority declined to apply *Chevron*, however, based in part on the importance of the issue.[121]

King is an excellent example of a context in which it makes sense for the Court to decline to apply *Chevron*. Whether you agree with

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113 *See, e.g.*, Michigan v. EPA, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring).

114 *See* Breyer, *supra* note 104, at 373.

115 *See supra* notes 91–92 and accompanying text.

116 *See, e.g.*, Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1015–16 (2005) (Scalia, J., dissenting).

117 *See* King v. Burwell, 135 S. Ct. 2480, 2487–88 (2015).

118 *Id.* at 2496–97 (Scalia, J., dissenting). Justice Thomas and Justice Alito joined Justice Scalia's dissent. *See id.*

119 *See id.* at 2491.

120 *Id.* at 2488.

121 *Id.* at 2483.

the majority's preferred interpretation or the dissenting Justices' preferred interpretation, it would make no sense to create a legal environment that would vary over time depending on whether Democrats—who strongly support the ACA—or Republicans—who strongly oppose the ACA—control the executive branch. The resulting vacillation in statutory interpretations would create uncertainty and chaos for citizens, insurance companies, and the agencies charged with responsibility to implement the statute.[122] The only other case in which the Court applied the "importance" exception to *Chevron*, *FDA v. Brown & Williamson Tobacco Corp.*,[123] was also a good candidate for application of the exception. In that case, it would not have been sensible to allow the Food and Drug Administration to regulate tobacco products during some presidential administrations and not during others.[124]

In *Michigan*, the Court applied *Chevron* but in an idiosyncratic manner that eliminated the potential for an agency to adopt a different interpretation in the future. All nine Justices concluded that any interpretation of an ambiguous provision of a regulatory statute that would allow an agency to make a major decision without considering its costs would be unreasonable.[125] This unusual application of step two of *Chevron* also eliminated the potential for differing interpretations over time as a result of changes in the regulatory philosophy of each President. The resulting consistency and predictability helps both regulated firms and the agencies that regulate them. There are many other contexts in which the importance of the interpretive issue justifies a decision not to defer to an agency's "reasonable" interpretation of an ambiguous statute or a rule, thereby creating a situation in which no one who is affected by the interpretation can act in reliance on the interpretation adopted by an agency at any particular time.

There are also many other situations in which the interpretive issue is not "important" but in which the potential for temporal inconsistency in interpretations makes no sense. The case that caused Justice Scalia to complain about deference doctrines illustrates such a context.[126] In *Perez v. Mortgage Bankers Association*,[127] the Court

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122 *See also* Richard J. Pierce, Jr., Response, King v. Burwell, GEO. WASH. L. REV. ON THE DOCKET (June 25, 2015), http://www.gwlr.org/king-v-burwell/.

123 FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 125–26, 159–61 (2000).

124 *See id.*

125 *See* Michigan v. EPA, 135 S. Ct. 2699, 2707 (2015); *id.* at 2712–13 (Thomas, J., concurring); *id.* at 2714 (Kagan, J., dissenting). Justice Ginsburg, Justice Breyer, and Justice Sotomayor joined Justice Kagan's dissent. *See id.*

126 *See supra* text accompanying note 111.

held unanimously that an agency can issue an interpretative rule that changes the prior agency interpretation of an ambiguous legislative rule without engaging in notice and comment.[128] That holding was a routine interpretation of the clear text of the Administrative Procedure Act ("APA"),[129] but it created an unfortunate situation.

The statutory provision the agency was implementing in *Mortgage Bankers*—the overtime provision of the Fair Labor Standards Act ("FLSA")[130]—required employers to pay employees time and a half for any overtime they performed unless the employees are "administrative."[131] The statutory definition of "administrative" was sufficiently ambiguous to support as reasonable contradictory interpretations of administrative in the context of many types of employees.[132] The Department of Labor ("DOL") used the notice-and-comment procedure to issue a legislative rule, but that rule also was sufficiently ambiguous to be susceptible to opposing interpretations in the context of many classes of employees.[133]

The interpretation of the rule at issue in *Mortgage Bankers* had the effect of requiring banks to pay employees that issue and administer mortgages time and a half for overtime on the basis that they are not "administrative."[134] The Court unanimously upheld that interpretation[135] even though it was the opposite of DOL's prior interpretation.[136] As the Court recited, the DOL interpretation of the statute and the rule had changed over time with great frequency.[137] Not surprisingly, the changes followed presidential elections in which control of the executive branch changed from one political party to another.[138]

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127 Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199 (2015).

128 *See id.* at 1206.

129 Administrative Procedure Act, 5 U.S.C. § 553(b)(A) (2012); *see Mortg. Bankers Ass'n*, 135 S. Ct. at 1206 (citing 5 U.S.C. § 553(b)(A), which states that the notice-and-comment requirement does not apply to interpretive rules).

130 Fair Labor Standards Act, 29 U.S.C. §§ 201–219 (2012).

131 *Mortg. Bankers Ass'n*, 135 S. Ct. at 1204 (citing 29 U.S.C. § 213(a)(1)).

132 *See id.* 1204–05.

133 *See id.*

134 *Id.*; *see* 29 U.S.C. § 213 (2012).

135 *Mortg. Bankers Ass'n*, 135 S. Ct. at 1206.

136 *Id.* at 1207–09.

137 *See id.* at 1204–05.

138 Thomas Means, Daniel Wolff, & Sharmistha Das, *Gov't Victory in Perez V. MBA May Be Pyrrhic*, Law360 (Dec. 8, 2014, 4:15 PM), http://www.law360.com/articles/602134/gov-t-victory-in-perez-v-mba-may-be-pyrrhic ("[At oral argument,] Chief Justice John Roberts emphasized the change of administration between the two conflicting interpretations, hinting at a cynical (and indubitably correct) perspective on why agencies frequently choose to reinterpret regulations in lieu of actually changing the regulatory text through notice-and-comment

When a Democratic President replaced a Republican President, DOL changed its interpretations of many provisions of FLSA in ways that benefited employees. When a Republican President replaced a Democratic President, DOL changed its interpretations of FLSA in ways that favored employers.

FLSA is only one of many agency-administered statutes that can support diametrically opposed "reasonable" interpretations that favor either important Democratic constituencies or important Republican constituencies. The National Labor Relations Act ("NLRA")[139] is another classic example of such a statute. The notorious changes in interpretations of the NLRA by the National Labor Relations Board ("NLRB") when control of the agency changed hands from one party to another explain the unusually non-deferential application of the ordinarily deferential "substantial evidence" test that the Court adopted and applied in *Allentown Mack Sales & Service, Inc. v. NLRB*.[140] The Court described in detail (and with obvious disapproval) the many ways in which the NLRB had changed its interpretations and applications of the NLRA to produce results that favored either employees or employers.[141]

Like the vast majority of the multitude of interpretations of ambiguous statutes and rules that change from one administration to another, the interpretations at issue in *Mortgage Bankers* and *Allentown Mack* are not "important" to anyone except politicians and some of the constituencies to which they are beholden. Yet, it seems wrong in some important sense to acquiesce in a legal regime that allows myriad changes in the meaning of legal terms every time a President of one party replaces a President of the other party. Circumstantial evidence supports the inference that all of the Justices dislike this temporally inconsistent effect of deference doctrines. They appear to share a well-founded belief that the law should not change significantly every time there is a change in the party that controls the executive branch.

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rulemaking: it is easier for new administrations to change old administrations' policies without the hassle of rulemaking.").

139 National Labor Relations Act, 29 U.S.C. §§ 151–169 (2012).

140 Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359 (1998). See II RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 11.2 (5th ed. 2010), for detailed discussions of the substantial evidence test and the Court's unusual application of the test in *Allentown Mack*.

141 *See Allentown Mack*, 522 U.S. at 375–80.

III. Costs and Benefits of a Change in Deference Doctrines

The costs and benefits of a major change in deference doctrines depend on the nature of the change. One option would be to eliminate all deference doctrines. That change would reduce temporal inconsistency but at a very high cost in terms of increased geographic inconsistency and failure to recognize the comparative institutional advantages agencies possess, in the forms of superior knowledge of the field and superior understanding of the ways in which an interpretation of a statute affects the ability of the agency to implement a coherent and efficient regulatory regime.

Another option would be to replace *Chevron* and *Auer* deference with *Skidmore* deference. That change would reduce temporal inconsistency and retain recognition of the comparative institutional advantages of agencies. Those benefits would come at a high cost, however, in the forms of an increase in geographic inconsistency and a return to the inconsistent and unpredictable pattern of interpretations that existed prior to *Chevron* and that have followed the Court's reduction in the scope of *Chevron* and its blending of the *Chevron* and *Skidmore* doctrines between 2000 and 2002.

A third option would be to eliminate deference in contexts in which a change in interpretation is motivated only by a change in the political party that controls the executive branch. The *Skidmore* doctrine incorporates that factor by giving greater deference to longstanding interpretations than to new or changed interpretations. That doctrinal change would have about the same costs and benefits as the second option. It would also introduce a new problem. Courts would often find it difficult to distinguish between changes that are motivated solely by politics and changes that are based in part on changed facts or changed understandings of the relationships among facts. A change in doctrine that eliminates or reduces deference in the latter situation would have particularly bad effects by rendering obsolete or inefficient regulatory regimes impervious to change.

Peter Strauss has suggested a fourth option.[142] Reduce or eliminate deference in Supreme Court decisionmaking by implementing any of the first three options but retain strong versions of *Chevron* and *Auer* deference in circuit courts.[143] Since there are thirteen circuit courts and only one Supreme Court, that change might be the optimal

142 *See* Strauss, *supra* note 5, at 1121–35.

143 *See id.*

way of balancing the goal of reduced temporal inconsistency with the goal of maximum geographic consistency, while retaining, in the circuit courts, the predictability and recognition of comparative institutional advantages that inhere in any legal regime and that incorporates a high degree of deference to agency actions.

The Strauss suggestion raises another interesting question, however. Can, and should, the Supreme Court establish for the first time a legal regime in which it tells lower courts to do as we say and not as we do? I leave that important question for others to debate.